

PD-0284-21

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN**

FILED
COURT OF CRIMINAL APPEALS
12/7/2021
DEANA WILLIAMSON, CLERK

EX PARTE CEDRIC RICHARDSON

02-19-00478-CR

From the Court of Appeals for the Second District of Texas

*Appealed from the Denial of Writ of Habeas Corpus
Cause No. 1503620D
Criminal District Court No. 1 of Tarrant County, Texas
The Honorable Elizabeth Beach, Presiding*

AMICUS LETTER OF ADDITIONAL SUPREME COURT AUTHORITY

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TO THE HONORABLE JUDGES OF SAID COURT:

Now comes the Comal County Criminal District Attorney's Office, and submits this *Amicus Letter of Additional Supreme Court Authority*,¹ and would respectfully show unto this Honorable Court the following:

I. The State's Brief Correctly Cited the Then-Existing Four-Justice 'Plurality' Portion of Currier.

This Cause was submitted to the Court on the Briefs on December 1, 2021. In the State's Brief, the State noted that a four-Justice "*plurality* of the Supreme Court has begun questioning whether collateral estoppel should apply to criminal prosecutions and whether it comports with the Double Jeopardy Clause's original meaning." State's Brief at 10 (emphasis added) (citing *Currier v. Virginia*, 138 S.Ct. 2144, 2148-50 (2018); *id.* at 11 n.3 (noting that two Judges on this Court have expressed similar reservations in light of *Currier*, citing *State v. Waters*, 560 S.W.3d 651, 663 (Tex. Crim. App. 2018) (Newell, J., and Hervey, J., concurring)); *id.* at 11 n.4 (noting *Currier's* concern that the lack of appellate review of acquittals in criminal cases leads to a lack of confidence that the initial result was substantially

¹ The Comal Criminal District Attorney's Office tenders the instant *Amicus Curiae Letter* in support of Tarrant County's position. *See cf.* Tex. R. App. P. 11. The undersigned was not paid any fee for the preparation of the instant document, aside from his standard Comal County salary as an Assistant District Attorney. *See id.*; *see also Booth v. State*, 499 S.W.2d 129, 135-36 (Tex. Crim. App. 1973).

correct—removing an essential underpinning of the civil collateral estoppel doctrine).

II. Amicus Letter of Additional Supreme Court Authority:

Notably, Two Justices Who Have Subsequently Joined the Supreme Court May Well Agree With *Currier*’s Plurality—and in Fact, One Such Justice Appears to Have Cited to Said Plurality With Approval.

The *Currier* Part III plurality was composed of the four most conservative Justices, all of whom remain on the Supreme Court. *See Currier*, 138 S.Ct. at 2148 (Gorsuch, J., Roberts, C.J., Thomas and Alito, JJ.); *id.* at 2152-56. Two more conservative Justices joined the Court after *Currier* was issued—Justices Kavanaugh and Barrett. Said Justices may well agree with Part III of *Currier*; indeed, Justice Kavanaugh appears to have subsequently cited to that portion of *Currier* with approval:

...preclusion rests on “an underlying confidence that the result achieved in the initial litigation was substantially correct,” and **that confidence, in turn, is bolstered by the availability of appellate review**. In *Currier* and *Bravo-Fernandez*, we were reluctant to apply issue preclusion, not because the *subsequent* trial was criminal, but because the *initial* trial was. **While a defense verdict in a criminal trial is generally not subject to testing on appeal**, summary judgment in a civil declaratory judgment action can be appealed. Indeed, the Crow Tribe did appeal the District Court’s decision to the Tenth Circuit and petitioned for our review of the Tenth Circuit’s decision. The concerns that we articulated in *Currier* and *Bravo-Fernandez* have no bearing here.

Herrera v. Wyoming, 139 S. Ct. 1686, 1712 (2019) (Alito, J., Roberts, C.J., Thomas and **Kavanaugh**, JJ., dissenting) (internal citations omitted) (*italics emphasis in*

original, bold emphasis added).² The Court’s decision in the instant case could ultimately lead to a 5-4 or 6-3 majority of the Supreme Court expressly adopting the *Currier* plurality. *See supra*; *see also, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“...it is this Court’s prerogative alone to overrule one of its precedents.”).

Because this Honorable Court may find the foregoing relevant and helpful to its decision, the State respectfully submits the foregoing *Amicus Letter of Additional Supreme Court Authority* for the Court’s review and consideration.

Respectfully submitted,

/s/ Joshua D. Presley

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As Amicus Curiae

² Though he was in the majority, Justice Gorsuch did not disavow (or even mention) *Currier*; he simply concluded that particular appellant was not precluded from arguing a position based on a prior—and since disavowed—line of cases. *See id.* at 1697-98.

Certificate of Service

I, Joshua D. Presley, Assistant Criminal District Attorney and amicus curiae for the State of Texas, hereby certify that a true and correct copy of the instant *Letter* has been sent to the parties in the case, including the following:

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In addition to the State Prosecuting Attorney's Office at Stacey.Soule@SPA.texas.gov by electronic service to the foregoing email addresses, on this, the 3rd day of December, 2021.

/s/ Joshua D. Presley
Joshua D. Presley

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